

is not incapable of giving rise to an estoppel, but there is nothing in the attendant circumstances which would permit an estoppel based upon it, whatever its range, to exclude a plea based upon the invocation of statutes of such nature as the Moneylenders Ordinance and the Bills of Sale Ordinance.

For these reasons their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Graham Page & Co.; Bulcraig Davis.*

PUBLIC PROSECUTOR v. LASAKKE

[O.Cr.J. (Simpson J.) December 12, 1963]

[Tawau—Criminal Trial No. 0/39 of 1963]

Penal Code, s. 300, Exception 1—Murder—Grave and sudden provocation—What constitutes—Series of provocative acts.

On June 8, 1963, the accused killed the deceased with a parang. Prior to this, the deceased tried to have intercourse with the accused's wife. The accused was told of this but said nothing. The deceased told the wife that he wanted to marry her and threatened that if her husband would not divorce her he would kill him to achieve his purpose.

On June 8, 1963 the deceased met the accused and said: "Eh? Have you divorced your wife yet?" Later the deceased again taunted the accused with these words: "Eh, are you not ashamed? Don't you realise all your friends know I have interfered with your wife. Why don't you divorce her?" The accused did nothing but tears of shame came into his eyes. Later on the deceased struck the accused on the head. There was a commotion as a result of which the deceased was killed.

Held: the series of grave provocations deprived the accused of his power of self-control and the final of provocation having regard to all the circumstances of the case was sufficiently grave and sudden to prevent the offence from amounting to murder.

CRIMINAL TRIAL.

Charles Ho (Cadet Legal Officer) for the Public Prosecutor.

A. F. H. Crawshaw for the accused.

Simpson J.: The accused is charged with the murder of a fellow Indonesian, Labidah at Kampong Ambar, Tawau, on 8th June, 1963.

That day — it was a public holiday — at about 1 p.m. he, together with a friend Langke, went to the house of one Mustamin in order to extract some clothing from a suitcase which he kept there. Mustamin was not at home but his wife Raba was there. Also there on the verandah was Labidah whom he knew well. Labidah too kept a suitcase containing clothes in that house. Raba in her husband's absence offered the 3 men coffee and later rice. While they drank the coffee and ate the rice nothing untoward happened as far as the prosecution witnesses observed. After the meal Langke was on the verandah, Raba in the kitchen. Suddenly there was a commotion

A and the sound of a blow and both saw the accused and Labidah struggling for possession of a parang on the verandah near the door to the dining room. Labidah already had a severe cut on the left side of his head.

Langke and Raba ran off. When Raba returned Labidah's body was lying on the grass about 36 yards from the house. On medical examination it was found to have several extremely severe wounds mainly on the head, neck and shoulders caused by a weapon such as a parang. Death was due to these wounds, more than one of which would have been immediately fatal. Several were probably caused just after death.

There can be no doubt whatsoever that these wounds were caused by the accused and that he intentionally caused the death of Labidah. Indeed he made no attempt to deny it.

There is no suggestion that the accused was other than normal.

D The only question is whether the accused was deprived of his powers of self-control by grave and sudden provocation.

According to Langke when he asked the accused before he was arrested why he had done it, the accused replied "He interfered (sexually) with my wife." Accused's wife, called by the prosecution, said that on three occasions, her husband having gone to work, the deceased tried to have intercourse with her but she refused. She told her husband but he took no further action apart from stopping the deceased from having his meals with them. The deceased also told her that he wanted to marry her and threatened that if her husband would not divorce her he would kill him to achieve his purpose. The last occasion was about a month before the death of Labidah. There is no doubt that the accused had cause to dislike and distrust the deceased.

G According to the accused when he arrived at Raba's house the deceased said quietly. "Eh? Have you divorced your wife yet?" Langke who was some distance behind could not have heard. Later as the deceased was helping the accused to open his suitcase with a parang in the bedroom the deceased again taunted him with the words. H "Eh, are you not ashamed? Don't you realise all your friends know I have interfered with your wife? Why don't you divorce her?" The accused did nothing but tears of shame came into his eyes. After the meal which followed the accused went to the window with his head bowed and his mind confused. He decided to go home but as he reached the steps Labidah who was standing there held him and struck him on the forehead. Langke he said was at the far side of the verandah watching children playing.

The accused impressed me as a basically truthful witness. While I doubt if the deceased

actually struck him on the forehead I consider it not unlikely that the deceased in some way deliberately obstructed him. This would well have happened without Langke observing it and would provide the last of a series of undoubtedly grave provocations. There is no doubt that the accused was at the moment deprived of the power of self-control. I agree with the assessors and I find that this act of provocation was having regard to all the circumstances sufficiently grave and sudden to prevent the offence from amounting to murder.

I find the accused not guilty of murder but guilty of culpable homicide not amounting to murder.

Sentence:

Deliberate killing with extreme violence provocation has reduced the offence to culpable homicide but the accused must learn that he cannot come to this country and commit such acts of violence — maximum — life imprisonment. I sentence accused to 10 years imprisonment.

MAHMOOD ALI v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 22, 1963]

[Kota Bharu — Criminal Appeal No. 36 of 1963]

Criminal Procedure—Plea of guilty—Counsel informing Court before end of prosecution case that appellant wishes to plead guilty—Record of President stating “Accused confirmed the plea. Plea accepted”—Whether record sufficient—Criminal Procedure Code (Cap. 6), s. 173(b).

Oaths and Affirmation Ordinance, 1949, ss. 4(1)(a), 8—Swearing by the Koran—Observations on.

The appellant was charged under section 420 of the Penal Code on 3 counts. He claimed trial and the learned President of the Sessions Court recorded the evidence as adduced by the prosecution. Before the case for the prosecution was closed, appellant's counsel informed the Court that the appellant wished to plead guilty. The learned President then recorded as follows: “Accused confirmed the plea. Plea accepted.” On appeal,

Held: the record of the learned President that the “accused confirmed the plea” was not enough. There should be a record to show that the accused was asked to plead on all 3 counts and his plea in respect of each count. There should also be a record to the effect that the learned President has ascertained that the appellant understood the nature and consequences of his plea in respect of each charge and he intended to admit without qualification each offence alleged against him.

Observations on swearing by the Koran.

Case referred to:—

(1) *R. v. Heyes* 34 Cr. App.R. 161.

CRIMINAL APPEAL.

T. Selvarasan for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Hashim J.: The appellant was charged under section 420 of the Penal Code on 3 counts. He claimed trial and the learned President of the Sessions Court at Kota Bharu recorded the evi-

dence as adduced by the prosecution. Before the case for the prosecution was closed, appellant's counsel informed the Court that appellant wished to plead guilty. The learned President then recorded as follows:— “Accused confirmed the plea. Plea accepted.”

Lord Goddard C.J. in his judgment in *R. v. Heyes* ⁽¹⁾ said *inter alia* “Counsel then indicated that his client desired to withdraw his plea and plead guilty to receiving. The shorthand note rather unfortunately does not contain any indication that the appellant was asked to plead, but merely a statement that his counsel said that he wished to plead guilty. Of course, that is not enough; the prisoner must himself plead.” In my opinion, the record of the learned President that the “accused confirmed the plea” is not enough. There should be a record to show that the accused was asked to plead on all three counts and his plea in respect of each count. There should also be record to show that the learned President had ascertained that the appellant understood the nature and consequences of his plea in respect of each charge and he intended to admit, without qualification, each offence alleged against him — see section 173(b) Criminal Procedure Code (Cap. 6).

In the course of the proceedings the defence counsel stated that if a prosecution witness would dare to swear by the Koran his client, the appellant would plead guilty and would be prepared to go to prison. A Koran was handed to this witness and he swore by the Koran. Two more prosecution witnesses also swore by the Koran. With great respect I think learned defence counsel went beyond legitimate practice by requesting that prosecution witnesses be sworn by the Koran and the learned President went beyond his powers in allowing such a procedure to be adopted in his Court. Section 4(1)(a) of the Oaths and Affirmations Ordinance 1949 makes it obligatory for a witness in proceedings in Court to take the oath and the form of oath or affirmation is prescribed under section 7 of the Ordinance. It is the invariable practice of the Court to affirm a witness in any proceedings in Court as follows:—

“I, A.B., do solemnly sincerely and truly declare and affirm that the evidence which I shall give in this case shall be the truth, the whole truth, and nothing but the truth”.

I do not think any other form of oath or affirmation is necessary or required in any proceedings in a Court constituted under the Courts Ordinance 1948. Presumably the learned President had the provisions of section 8 of the Oaths and Affirmations Ordinance 1949 in mind when he allowed the prosecution witnesses to swear by the Koran. In my opinion it is desirable that such a procedure should be confined to civil cases only as provided under section 9 of the Ordinance